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EXPLAINER

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Overcoming the Filibuster Through Budget Reconciliation

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With the Senate currently split 50-50 between Democrats and Republican and the filibuster functionally requiring 60 votes for all major legislation, the Democratic majority will try to move its legislative priorities through the reconciliation process. This explainer lays out the budget reconciliation process, including considerations for what provisions are eligible to be passed through reconciliation.

The “Jim Crow” Filibuster

While the House can limit debate and pass legislation with a majority vote, the Senate historically has not had rules which allowed a simple majority to limit or close debate. In 1917, the Senate adopted Senate Rule XXII—the cloture rule—to allow Senators to end debate and proceed to a final vote with a two-thirds majority vote. While Senators had the ability to debate endlessly, this was generally not exploited except during the Jim Crow era when Southern Senators used the filibuster to repeatedly block civil rights legislation. In 1975, the threshold for ending debate and invoking cloture was reduced from a two-thirds majority to a three-fifths majority.¹

Use of the filibuster ramped up in recent decades. During the Obama Administration, the practice under Senate Republican Leader Mitch McConnell became to filibuster everything. In response, Senate Democrats changed the rules to eliminate the filibuster for all nominations other than for nominations for the Supreme Court. While Senate Republicans eliminated the filibuster for Supreme Court nominations in 2017, the filibuster remains in place when it comes to legislation.

Senate Rule XXII has become the primary way of ending debate and bringing major legislation to a vote. Absent 60 votes in favor of cloture, the Senate cannot proceed to a final vote on the measure if any single Senator objects to moving forward. The bill is filibustered.

Exceptions to the 60-vote threshold include nomination votes, budget resolutions, budget reconciliation bills, and situations in which a statute requires expedited or privileged consideration by the Senate (like the Congressional Review Act or the War Powers Resolution). Given the current 50-50 partisan split in the Senate, 60 votes do

¹ United States Senate, Filibuster and Cloture, https://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm.

not exist in favor of most of the majority's priorities, making the budget reconciliation process the most viable path forward for such legislation until the Senate reforms the filibuster.

The Budget Reconciliation Process

Budget reconciliation is not subject to the filibuster, and thus provides a vehicle for pursuing the majority's priorities when it does not have 60 votes. A reconciliation bill needs only a simple 51-vote majority (including the Vice President in his or her role as President of the Senate) to pass in the Senate.

To use the budget reconciliation process to pass legislation, Congress must first pass a budget resolution that provides instructions to specific committees in the House and Senate.² Reconciliation instructions in the budget resolution play an important role in determining what can be included in the eventual reconciliation bill. They name which committees in the House and Senate can write provisions of the reconciliation bill. No provisions outside of the jurisdiction of the named committees can be included. The reconciliation instructions also provide each individual committee with directives for how much to adjust spending, revenue, or the debt limit. Committees cannot increase spending or reduce revenue by more than the amount directed in the budget resolution.³

While senators cannot filibuster a budget resolution, they can offer unlimited amendments, which usually results in an all-night "vote-a-rama" on dozens of budget amendments. After the House and Senate have passed budget resolutions, they must reconcile any differences between their resolutions and potentially vote again. Both chambers must pass identical budget resolutions with reconciliation instructions for a bill to bypass a Senate filibuster using budget reconciliation.

Once the specified committees have their reconciliation instructions, they can draft legislation to meet their individual spending, revenue, and debt limit directives. All of the relevant committees' provisions are then "stapled together" by the House and Senate Budget Committees and brought to the floor of each chamber as a single budget reconciliation bill. As with budget resolutions, budget reconciliation bills are not subject to filibuster but can be amended. However, with the exception of amendments to strike specific provisions, the Congressional Budget Act does not

² Reconciliation instructions also allow for increasing the debt ceiling if the House Ways and Means Committee and Senate Finance Committee are given such a directive.

³ If reconciliation instructions direct a committee to reduce spending (or increase revenue) by a specific amount, that amount is considered the minimum amount by which that committee must reduce spending (or increase revenue). Similarly, if reconciliation instructions direct a committee to increase spending (or decrease revenue) by a specific amount, that amount is the maximum amount by which the committee can increase spending (or decrease revenue).

allow for the consideration of any amendments that would cause a committee to increase the deficit by more or reduce the deficit by less than its target. While any amendments offered in the Senate must be germane and cannot violate the Byrd Rule (explained below), there is no limit to the number of amendments that can be offered.

Practically speaking, Congress can pass one reconciliation bill per budget resolution. Given that no FY2021 budget resolution has passed, Congress has the ability to pass budget resolutions and reconciliation bills for FY2021, FY2022, and FY2023 during the 117th Congress.⁴

What Can Pass Under Reconciliation: The Byrd Rule and Other Limitations

There are specific limitations on what can advance in a budget reconciliation bill. Budget reconciliation was originally intended to be used for only net deficit reduction, and Congress has adopted rules to block non-budgetary provisions from being included. Section 313 of the Budget Act, known as the Byrd Rule, excludes categories of legislation from eligibility for reconciliation. Under the Byrd Rule, a provision is ineligible for reconciliation if it meets any of the following criteria:

1. It does not change expenditures or revenues or the conditions by which they are made or collected.⁵
2. The changes to expenditures or revenues are merely incidental to the relevant provision.
3. It is outside the jurisdiction of the committee that submitted the provision.
4. The change in expenditures or revenues does not comply with the relevant committee's reconciliation instructions.⁶
5. It increases the deficit outside the budget window.⁷
6. It changes Social Security.

The first two requirements exclude a broad set of legislation from consideration under budget reconciliation. The first basically requires a provision to have a budgetary impact that could be measured in a score from the Congressional Budget

⁴ Congress could additionally potentially use Section 304 of the Budget Act to revise an existing budget resolution and create additional reconciliation directives, but this has never been previously attempted. It could also address expenditures, revenues, and the debt limit in separate bills, but it usually addresses both together in a single bill.

⁵ A provision that does not by itself change expenditures or revenues may be allowed if it specifies the terms or conditions of other provisions in the reconciliation bill that do change expenditures or revenues.

⁶ Any directives instructing a committee to reduce the deficit are treated as a floor, while directives instructing a committee to increase the deficit are treated as a ceiling.

⁷ The House and Senate have never set a budget window beyond ten years so this effectively requires a reconciliation bill to be deficit-neutral or deficit-reducing after ten years.

Office. That test is fairly easy to determine. The “merely incidental” test in the second requirement gets much more complicated.

“Merely Incidental” Provisions

In determining compliance with the Byrd Rule, the most difficult determinations involve whether the budgetary components of any provision are “merely incidental” to its non-budgetary components. A 2005 Senate Budget Committee document explains that such a determination requires “the exercise of judgment” and that “the Parliamentarian has not laid down any bright-line test to aid that judgment, and reserves the right to consider each individual case on its merits.”⁸

In making a “merely incidental” determination, the Parliamentarian—a nonpartisan officer of the Senate—will first consider whether the primary purpose or motive of the provision is budgetary or whether it is an attempt to make non-budgetary policy. The Senate Parliamentarian will specifically prohibit any provisions “in which policy changes plainly overwhelmed deficit changes.”⁹ A 2018 journal article noted that provisions will also violate the “merely incidental” standard “if they affect a limited number of taxpayers,” including provisions that “bestow benefits on a narrow group, as well as measures that would bring such limited benefits to an end.”¹⁰ Additionally, policies that impose mandates are generally not allowed.

Past reconciliation bills provide numerous examples of provisions that the Parliamentarian ruled that were eligible for reconciliation and others that were considered “merely incidental.”¹¹ These examples provide historical context that informs consideration of what priorities are eligible for reconciliation in the 117th Congress. Provisions that have previously been ruled to violate the Byrd Rule include:

- From the Omnibus Budget Reconciliation Act of 1990
 - Imposing criminal penalties for violations of workplace safety laws.
- From the Balanced Budget Act of 1995

⁸ Byrd Rule Annotated, Senate Committee on the Budget, Annotations by William G. Dauster Democratic Deputy Staff Director and General Counsel, Committee on Finance. October 2005.

<https://budgetcounsel.files.wordpress.com/2016/12/byrd-rule-annotated-preliminary-draft-october-2005.pdf>.

⁹ Id.

¹⁰ Ellen Aprill & Daniel Hemel, “The Tax Legislative Process: A Byrd’s Eye View,” 81 Law and Contemporary Problems 99 (2018).

https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13722&context=journal_articles.

¹¹ The 1996 Personal Responsibility and Work Opportunity Reconciliation Act, however, does not serve as useful precedent as to what is allowable via reconciliation because the legislation’s overwhelming support in the Senate meant that senators did not raise many of the points of order rights available to them.

- Barring the use of federal funds for abortion.
- From the Deficit Reduction Act of 2005
 - Allowing Medicaid patients to recover for medical malpractice only if they could show that the hospital or physician violated a “gross negligence” standard, as opposed to just a “negligence” standard.
- From the Health Care and Education Reconciliation Act of 2010
 - Limiting the ability of health insurers to raise rates.
 - Allowing community health centers and federal grantees to purchase prescription drugs at discounted prices.
 - Enhancing the powers of Medicare’s Independent Payment Advisory Board.
 - Requiring existing group plans for health insurance to cover preventive services.
 - Barring health insurers from charging higher rates to smokers.
- From the Healthcare Freedom Reconciliation Act of 2015
 - Repealing the Affordable Care Act’s individual or employer mandate.¹²
- From the Better Care Reconciliation Act of 2017
 - Prohibiting Planned Parenthood from receiving Medicaid funds for one year.
 - Preventing premium tax credits and small business tax credits from being used to purchase health insurance that covers abortion.
 - No longer requiring states to cover essential health benefits in their Medicaid alternative benefit plans.
 - Imposing a six-month waiting period for individuals attempting to enroll in coverage in the individual health insurance market who cannot demonstrate that they have maintained continuous coverage.
 - Allowing health insurers to charge older patients up to five times what they charge younger patients.
 - Allowing states to determine how much health insurers are allowed to spend on administration, marketing, and profits versus health care.
 - Allowing states that spend less than their targeted block grant amount to roll over funds to the following year and to use funds for nonhealth purposes, specifically repealing the provision of the Social Security Act that prohibits states from using Medicaid funds to build roads, bridges, and stadiums.
 - Limiting the ability of New York State to require counties other than New York City to contribute funding to the state’s Medicaid program.
- From the Tax Cuts and Jobs Act of 2017
 - Allowing taxpayers to set up Section 529 education savings accounts for “unborn children.”

¹² The Parliamentarian did rule however, that reconciliation allows for the penalty for violating either of these mandates to be set at zero.

- Permitting Section 529 savings accounts to be used for homeschooling.
- Repealing the tax-exempt status of professional sports leagues.
- Requiring foreign airlines to pay U.S. corporate taxes on some of their profits.
- Modifying the Johnson Amendment barring candidate endorsements by 501(c)(3) nonprofits to exclude statements, “made in the ordinary course of the organization’s regular and customary activities.”

Provisions that the Parliamentarian has ruled do not violate the Byrd Rule include:

- From the Omnibus Budget Reconciliation Act of 1993
 - Expanding the earned income tax credit.
 - Creating tax preferences for “empowerment zones” and “enterprise communities.”
 - Extending Food Stamps to new beneficiaries.
 - Imposing an assessment on cigarette manufacturers importing more than twenty-five percent of the tobacco they used.
- From the Better Care Reconciliation Act of 2017
 - Allowing states the option to impose work requirements on Medicaid enrollees who are nondisabled, nonelderly, and nonpregnant.
 - Including abortion restrictions on funding for the State Stability and Innovation Fund by tacking the Fund onto the CHIP program.
 - Permanently repealing Affordable Care Act cost-sharing subsidies.
 - Requiring states to include information on per-capita cap enrollment and expenditures, psychiatric hospital expenditures, and children with complex medical conditions in their Medicaid expenditure reports.
 - Granting \$10 billion to Medicaid non-expansion states.
- From the Tax Cuts and Jobs Act of 2017
 - Opening the Alaska National Wildlife Refuge (ANWR) to oil drilling.

Many of these provisions were part of tax and healthcare legislation, and there is significantly less precedent on other policy areas. There is also no public proceeding or formal justification providing for the Parliamentarian’s decisions. Instead, observers are left to discern patterns from decisions that have been publicly reported.

Other Byrd Rule Requirements

The third and fourth Byrd Rule requirements make clear that House and Senate committees have to follow the reconciliation instructions in the budget resolution. A committee cannot get around its instructions by including a provision that would normally be outside its jurisdiction. And even for provisions within its jurisdiction, the provision must actually accord with spending and revenue directives.

The fifth requirement, which bars increasing the deficit outside the budget window, can have long-term implications for how legislation is drafted. If a provision increases the budget deficit without an offset, it has to phase down to prevent deficit increases outside of the 10-year budget window. This is why Congress wrote both the Bush and Trump tax cuts to expire.

Beyond the Byrd Rule

Even if a provision follows the Byrd Rule, it can still run into other limitations. For example, spending provisions can still be subject to existing statutory budget caps, such as in the Budget Control Act. Reconciliation is also subject to the Statutory Pay-As-You-Go Act. That means that if the legislation increases the deficit, the President is required to sequester an equivalent amount of funding from certain mandatory programs as an offset. Addressing any potential sequestration cannot be done via reconciliation and would require 60 votes in the Senate. This was also an issue for the 2017 tax cuts passed by Republicans under reconciliation, and was later addressed in a must-pass government spending bill.¹³

Reconciliation legislation has only included mandatory and not discretionary spending through the Appropriations Committee since the Byrd Rule was adopted. However, this is only a matter of practice. This limitation is not in statute.

Enforcement of the Byrd Rule

Prior to coming to the Senate floor for consideration, reconciliation legislation undergoes a process known as the “Byrd Bath,” under which the Senate Parliamentarian determines whether each provision included in the reconciliation legislation complies with the Byrd Rule. If the Senate Parliamentarian advises that a provision does not comply, the provision is typically removed to ensure the entire bill can advance under budget reconciliation procedures, rather than as standard legislation subject to a potential filibuster. If a provision that the Parliamentarian ruled violated the Byrd rule is nevertheless included in a reconciliation bill that comes to the floor, it can be subject to a point of order. A Senator can move to waive that point of order after a ruling by the presiding officer. Waiving a Byrd Rule point of order requires 60 Senators to vote in favor of doing so. If a point of order is raised against a provision, sustained, and not waived, the individual provision is stricken from the bill, but consideration of the bill can continue.

While the Senate Parliamentarian provides a recommendation as to whether a provision violates the Byrd Rule, the Senate’s Presiding Officer theoretically has discretion to overrule the Senate Parliamentarian. Such a decision could itself be

¹³ See Tara Golshan, “Republicans are preventing their tax bill from triggering a \$25 billion cut to Medicare,” December 21, 2017. <https://www.vox.com/policy-and-politics/2017/11/14/16651184/gop-tax-bill-medicare-cut-paygo>.

subject to a point of order and could only be overturned by an affirmative vote of 60 Senators. In practice, ignoring the advice of the Parliamentarian would be a serious break with historical precedent and has never occurred during consideration of any reconciliation bill. If the Presiding Officer follows the advice of the Parliamentarian, it also takes 60 votes to waive the point of order and keep the provision—effectively no easier than advancing the provision as a standalone bill subject to filibuster.

Conclusion

Budget reconciliation is an overly complicated and opaque process, which can only be used to advance policy provisions that can survive its procedural obstacles. Absent broader filibuster reform, however, it is often the best path forward given the constraints created by the current 60-vote threshold to move most bills in the Senate. Undoubtedly, it will be a frustrating process for the current congressional majority as it has been for past majorities. In the end, it underscores the need for larger changes to the Senate rules.